NUNC PRO TUNC
MAR 12 2008

UNITED STATES OF AMERICA

SOUTHERN DISTRICT OF CALIFORNIA.

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UNITED STATES OF AMERICA. PLAINTIFF. Vs. JUAN CARLOS MARTINEZ OCHOA'. DEFENDANT.	CASE, NO. 07 MJ 2962 DFENDANT"S OBJECTION TO THE COURTS IMPOSITION OF PROBATION / superviced release because the relevant statute 8U.S.C. 1326 or 1325 does not mandate the imposition of seperate sentence.

COMES NOW, the defendant, In Pro Se and respectfully moves this Honorable court to grant this motion in the interest of justice, and pursuant to all of thi applicable laws, and rules of the United States. And in support thereof the defendant would show this honorable court as follows:

1)-. The Imposition of supervised release is not mandated by the fact of imprisonment, or the fact of the conviction.

8 U.S.C. Sec. 1326, authorizes Imprisonment and/or a fine. It is irrelevant wether the term of imprisonment is two, ten, or twenty years because none of this sections authorize the imposition of supervised release. Section 3583 (a) provides: "The court, in imposing a sentence of a term of imprisonment for a felony or misdemeanor, May include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after

imprisonment, except that the court shall include as a part of the sentence a requirement that that the defendant be placed on a term of supervised release IF SUCH TERM IS REQYIRED BY STATUTE or if the defendant has been convicted for the first time of a DOMES TIC VIOLENCE CRIME as defined in Section 3561(b)."

Even before the Supreme court's decision in BOOKER the court could depart from the guidelines and NOT IMPOSE A TERM OF SUPERVI SED RELEASE if it determines that supervised release is neither REQUIRED BY STATUTE NOR REQUIRED FOR ANY OF THE FOLLOWING REASONS (1) To protect the public welfare; (2) To enforce a financial co- ndition; (3) to provide drug or alcohol treatment or testing; (4) To assist the reintegration of the defendant into the community or (5) To acomplish any other sentencing purpose AUTHORIZED BY STATUTE. The only requirement that may apply is the first of the requirements, that that says TO PROTECT THE PUBLIC WELFARE, AND NO OTHER. It is respectfully submitted that that alegation/requir ement does not apply to a Sec. 1326, or Sec. 1325 case because Illegal Re-entry, or being found in the United States, or Attem pted re-entry is not a violent crime it is only made serious beca use of the penalties imposed for the violation of the statute. In fact being illegal in the United States is a MALA PROHIBITA It is like running a stop sign, or a red light wile driving a vehicle, the violator does'nt even have to be aware that he is commiting a crime.

In addition to the above, the U.S.S.G Sec. 5B1.3 (d)(6) requi- res that the government and the defendant make a stipulation of deportation in the plea agreement pursuant to 8 U.S.C. Sec.1228 (c)(5)or(B), in order for the court to impose any supervised release sentence. In the absence of a stipulation of deportation

..., after notice and hearing pursuant to such section, the attorney general demonstrate by clear and convincing evidence that the alien is deportable. A condition ordering deportation by a U.S. district judge.

In United States v. LIERO, 298 F.3d 1175 (9th Cir. 2002), Liero argued that the district court was not authorized to impose supervised release in the first place and so lacked authority to punish him for violating its terms. Id at 1176.

2). Pursuant to Apprendi, supervised release may not be imposed based solely upon the fact of a conviction or upon the imposition of imprisonment. Rather, before supervised release is authorized, section 3583(c) MANDATES that the district court consider specific sentencing factors. Thus, supervised release may only be imposed after an additional sentencing hearing at which the district court considers relevant factors and then imposes this increased penalty. A term of supervised release becomes an authorized sentence only if there are judicial--not jury--findings of the relevant sentencing factors. Hence, Congress intended precisely that which has been prohibited by Apprendi: "[The] legislature remove[d] from the jury the assessment of facts that incrised the prescribed range of penalties to which a criminal defendant is exposed." 530 U.S. at 490.

Furtheremore, even if the defendant pleaded guilty to the charge the defendant can still challenge the illegal imposition of the supervised release. See U.S. v. Baramdyka, 95 F. 3d 840 843 (9th Cir. 1996) (Autorizing defendant to challenge illegal sentence despite plea agreement to contrary).

GROUND ONE - Sentence is invalid because it violated petitioner's 6th Amendment rights. Judge used a prepond3rance of evidence method to convict petitioner. The prosecutor must prove to a jury all facts legally essential to the punishment with all safeguards of the constitution or admitted by the defendant in the plea agreement or the plea colloquy. USSG requires finding of facts essential to the punishment if not done via a jury - the sentence violates recently upheld constitutional standards. Petitioner was not found guilty by a jury of his peers - nor were any facts assessed - or deliberated by a jury discussing elements, sentencing factors, departures, ect. Additional factfinding by the court without jury involvement is a clear violation of known standards.

The use of a Criminal History Category greater than level one at sentencing violates the principles espoused in Blackley and upheld 1/12/05 in the booker decision. Criminal history caregories are determined using a hearsay laden presentence report prepared by u.S. Probation, using a preponderance of evidence method, presumptive and assumptive logic and obiusly biased statements not verified, or proven to be factu by a grand jury/ jury. Other than the fact of a prior conviction, any fact that increases the penalty for a crime must be submitted to a jury and proved beyond a reasonable doubt. Criminal History is a sentence enhancement factor which must go to a jury.

Criminal history and PSF/PSR's violate sixth amendment fights without a jury involvement clarifying the sixth amendment rights to confrontation with respect to hearsay testimony used in the case. It precludes the admission of hearsay statements implicating the defendant in a criminal procceding unless the prosecution demostrates that the statements possess "adecuate indicia of reliability. Petitioner must be able to cross examine all witnesses testimonials/declarations used in sentencing./petitioner never admitted the truth of the information contained within his presentence reports, never admitted in court the facts alleged in the report. The reports themselves were never read by the judge to him during the plea colloquy. The sixth and 12th amendments guarantee a jury standing between a defendant and the power of the state, and a jury's finding of any disputed fact essential to increase the cieling of a potencial sentence. "A defendant's choice to plead guilty will not alone support conviction, the defendant's guilt in fact must be established". "It is imperative that the court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond a reasonable doubt requirements". Undisputed erroneous calculation of petitioner's criminal history resulted in fact finding & sentence enhancements.

The framers of the constitution understood the threat of judicial despotism that could arise from arbitrary punishment upon arbitrary convictions without the benefit of a jury.

GROUND TWO - 18 USC §3583 was rendered unconstitutional per "Blakely" sinse 2004 upheld 1/12/05 and additionally was facially unconstitutional under "Apprendi"
Supporting facts: Violates 5th, 6th, and 14th amendment: All factors A - C violate "Apprendi" open to collateral attack (
3583 violates the 5th and 6th amendment prohibition against legislatively removing from the jury the assessment of facts that increases the prescribed range of penalties to which a criminal defendant is exposed. 3583(c) states "Supervised release may only be imposed after the district court considers additional-factors" sentence "other than the fact of a prior conviction, any fact that inreases the penalty for a crime beyond the prescribed statutory max must be submitted to a jury, and proved beyond reasonable doubt. A case announces a new rule if result was not dictated by precedent existing at the time the defendant's conviction became final" "Booker" does not save section 3583 from unconstitutional.

GROUND THREE - 18 USC §3583 is unconstitutional because it authorizes increases in punishment for supervised release violations based on judicial fact finding by a preponderance of evidence in 5 parts.
Supporting facts: 1) That the district court determined facts nor admitted by petitioner, nor proven to a jury beyon reasonable doubt, other than the fact of a privious conviction when determining a criminal history.
2) Violates "Blakely" by using criminal history points - factoring "elements" and sentencing factors illegally determined without protection of constitutional amendments clause. 3) Prosecution used as evidence to convict petitioner a presentenc report, and court-obtained their conclutions reflecting the layers of hearsay contained within. 4) Use of the above factors and elements results in a violation of the Federal Confrontation Clause of the 6th amendment, nor were the facts charged in the indictment. 5) That the cumulative errors deprived petitioner of due process to right to a fair trial.

GROUND FOUR - That the USS6 mandate in USS6 §5D1.1(a) of the imposition of supervised release for sentences cannot override the mandate of 18USC 3583(c) in which supervised release was imposed.

Supporting facts: And with USS6 4A1, 1, 2 ect. increases range of prescribed penalties without due process and allows for factors not charged in the indictment. 2) An indictment may not be broadened by amendment either literally or constructively except by the grand jury - rendering imposition of supervised release unconstitutional, illegal and moot. 3) Upheld 1-12-05 blakely does address that related cases addresses the Grand Jury right. 4) All USS6 statutes rely on 3583 for imposition and revocation of supervised release and therefore must be amended to not include the illegal 3583 statute. 5) Guidelines used to factor and determine supervised release along with alleged sentencing factors were declared unconstitutional in june, 2004 and became advisory in 1-12-05. Rendering moot the supervised release attached to inclusive of and part of petitioner's sentence and need be severed.

GROUND FIVE - That the illegally imposed supervised release prejudices petitioner should it be revoked in the future. In five parts violates due process clause of the 5th amendment.

Supporting facts: 1) An unconstitutional statute is void and is at no law. 2) If imposition of supervised release was in error in the first place - then District Court has no jurisdiction to revoke supervised release. 3) The max term of imprisonment does not authorize the district court to impose an additional term of custody after the defendant has served his original sentence.. The term of supervised release provides the sole basis for the district court's order reimprisoning a defendant, and because that term was imposed unconstitutional, the district court lacks jurisdiction to order a second custodial sentence. 4) Overall once defendant is convicted, pleads guilty, and discharges his custodial sentence, district courts sole authority to reimprison him derives from 18USC §3583. The constitutionality of the statute affects the whole procedings. 5) Automaticall creates a "double jeopardy" situation by allowing the underlying (original) offense to be used in any and all revocation procedings as the basis of enhancement.

guideline sentences are erroneous and should result in a remand/resentence even on plain error. Sentence of petitioner violated recently upheld constitutional standards. Petitioner was not sentenced solely on a guilty verdict. "The court should impose a sentence of the kind and within the guideline range is incompatible with the constitutional holding of 1-12-05.

GROUND SEVEN — Petitioner was imprisoned based upon a charge which a jury found the petitioner not guilty for the "alleged" underlying offense, and was given supervised released on a statute which calls for imprisonment or fine - not supervised release. This sentence is illegal because it violates the 5th and 6th amendment requiring a jury not a judge to find sentencing facts - the concerted actions of the statutes used, the operative guidelines and the relevant rule of criminal procedure resulted in unconstitutional judicial factfinding. An unconstitutional statute is void and is as "no law" for each matter controverted or used in hearsay to convict petitioner, the court must make either a finding on the allegation or a determination that no finding is necessary, as the controverted matter will not be used, or will be used ect... The judge found the facts by preponderance of evidence, rather than beyond a reasonable doubt, and on the basis of these findings without an evidentiary hearing , or confrontation. The judge imposed sentence, depriving the petitioner of liberty and due process. The constitution prohibits allowing a judge alone to make a finding that raises a sentence that could have lawfully been imposed by reference to facts found by a jury or admitted by defendant. The constitution mandates a jury by peers to consider and deliberate the relevant factors to assess guilt before a sentence can be imposed. An offense sentenced by an unconstitutional proceding process of law is not a crime; A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. The standard of proof is a burden placed in the government. Additionally the record is silent as to what factors under §3583 (if any) the district court found to warrant the imposition of supervised release. §3583 states that the court at the time of sentencing shall state in open court the reasons for the imposition of a particular sentence, when the record is silent, the silence is reversible error the record is unclear for the court to review whether the district court abused its discretion when imposing supervised release. 9th circuit law/opinion states supervised release is part and parcel of the original sentence and is a sentence itself, since the jury did not make the decision or find the facts necessary - it is illegal, void, and moot. Petitioner was sentenced in "bail jumping" but was never convicted of any crime - an indictment may not be broadened by amendment either literally or constructively except by the grand jury, this was done in this case and is a violation of "Williams" to the punishment is... no accusation within the requirements of the common law, and is no accusation in reason". 3-7-05 - court bans unproven evidence in a sentencing.

GROUND EIGHT - 1) Petitioner charged/convicted without the specifics stated in the indictment. 2) Cumulative error.

Supporting facts: As to what the relevant conduct is or what the criminal action was - that in fact was "alleged" committed by the petitioner - as the "alleged" underlying offense had been dismissed due to a jury finding petitioner not guilty. This also caused and causes a violation against double jeopardy. All of the "offenses/violations" must be stated specifically and implicitly and indictment. 2) cumulative error deprived petitioner the right (due process) to a fair trial.

GROUND NINE - Prosecutorial misconduct / misrepresentation of evidence and violation of "Brady".

Supporting facts: Prosecution suppressed material evidence favorable to the defence. Thereby holding back "Brady" material from the defence. Specific "hearsay testimonial evidence - was not cross examined and this evidence used by the prosecutor was flagrantly and blatantly misrepresented causing the petitioner harm and prejudice - not allowing the petitioner the right to a fair and impartial procedings/trial. Due process requires that the prosecution disclose to the defence, evidence that both favorable to de accused and material to guilt or punishment. 6th amendment confrontation clause violated here,

GROUND TEN - An appropriate and just sentence was not conclusive in this case.

Supporting facts: 1) Court never proved petitioner's behavior was not "aberrant behavior". 2) All factors of 3553 were not indicated - used or discussed in fashioning an appropriate and a just sentence in this case. These factors are necessary elements in the "proper" adjudication of cases. 3) Petitioner has not been given credit for his 26 days custody. 4) Petitioner's sole charge does not warrant an enhancement of criminal category even if it had been found relevant via a jury (which it was not).

GROUND ELEVEN - Petitioner ask the court to mandate correct good conduct time of 54 days upon B.O.P., and for court to use its discretions in allowing petitioner to serve time in a CCC.

1) Currently B.O.P. recognizes only 47 days - the statute calls for 54, currently is necessary for the courts to order the other "7 days" stipulated by statute.

2) A CCC is a place of confinement and upon agreement of both parties an individual may serve time in a Community Confinement Center or community corrections center - as it is a place of imprisonment under the plain language of the applicable statutes - petitioner's lack of criminal history - warrants a CCC for part of the sentence and is eligible for a split sentence under the statutes as all qualifications have been met.

WEREFORE, premises considered the defendant prays that this honor able court grant this objection to the imposition of the supervis ed release contemplated by the court.

Done this the 10th Day of MARCH 2008

In Pro Se

Respectfully Submitted

Fed. Reg. No. 99422-198

M.C.C. 808 Union Street

San Diego, Ca 92101

CERTIFICATE OF SERVICE

I hereby certify that the foregoing defendant's objection to the court's imposition of supervised release was placed in the instit ution's mail box on the ? Day of ? 2008 to the following:

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA
OFFICE OF THE CLERK 880 FRONT STREET, SUITE 4290
SAN DIEGO, CA 92101-8900

UNITED STATES DISTRICT ATTORNEY"S OFFICE
880 FRONT STREET, SAN DIEGO, CA 92101-8900

In Pro Se Respectfully Submitted